MALAYAN ROPES SDN. BHD.

v.

MALAYSIAN PRESTRESSED CONCRETE STRAND MANUFACTURING SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D4-22-602-90]
6 MARCH 1992

CIVIL PROCEDURE: *Whether plaintiff's present action - Action is a derivative action - Whether misconceived as guarantor of the 1st defendant - Whether plaintiff can institute the present derivative action - Whether plaintiff is a proper party to seek the relief sought for in the present application.*

The facts as pleaded in the statement of claim are that by a credit facilities agreement dated 7 January 1982 entered into between the 1st defendant and eight financial institutions (the creditors), including the 2nd defendant, the creditors severally agreed to make available to the 1st defendant credit facilities up to the maximum aggregate principal amount of RM20,000,000.

The 2nd defendant acted as the agent and trustee for and on behalf of the creditors. As security for the said facilities, the 1st defendant executed a debenture in favour of the 2nd defendant as trustee for the creditors.

By a guarantee dated 7 January 1982, the plaintiff and another guarantor jointly and severally guaranteed the repayment by the 1st defendant to the 2nd defendant of the credit facilities together with interest and costs.

The plaintiff is a major shareholder of the 1st defendant holding approximately 53% of the 1st defendant's paid-up and issued share capital.

On 29 November 1988, the 2nd defendant by a deed of appointment, appointed the third defendant as receiver and manager under the debenture. The receiver and manager then proceeded to advertise for the sale of the 1st defendant's assets. On 1 December 1989, a sale and purchase agreement was entered into between the receiver and manager and Southern Iron & Steel Holdings Sdn. Bhd. in which the latter agreed to purchase the assets of the 1st defendant.

In the instant application made by the plaintiff, the issue before the Court as observed by the learned Judge was whether the plaintiff, as shareholder and guarantor can bring the present derivative action and also if the said action was misconceived and bad in law.

Held:

[1] In view of the decision in *Watts* case, the learned Judge found that the derivative action brought by the plaintiff in the present case is misconceived. It should be noted that the property does not belong to the guarantor. It belongs to the 1st defendant. It follows therefore that the plaintiff is not the proper party to seek the relief sought for in the present application.

[2] If this Court is wrong in making the above finding, the next question to consider is whether the plaintiff is entitled to a restraining order on the basis of what was pleaded in the statement of claim. The authorities show that before a mortgagee can be restrained from selling mortgaged property he must be shown to have acted in bad faith or fraudulently.

[3] In the present case the plaintiff has not pleaded that the receiver and manager had acted in bad faith or fraudulently. If bad faith or fraud had been pleaded, then the Court can go into the merits of the application and determine whether there is a triable issue in this case.

[Plaintiff's application dismissed with costs.]

Cases referred to:

Standard Chartered Bank Ltd. v. Walker [1982] 3 AUBR 938 ***(dist)***
Watts & Anor v. Midland Bank [1986] BCLC 15 ***(foll)***
Forsyth v. Blundell [1973] 120 CLR 477 ***(cit)***
Kian Choon Investments (Pte) Ltd. v. Soceite Generale & Anor. [1990] 2 MLJ 74 ***(cit)***
Hoddington Quarry Ltd. v. Huson [1911] AC 722 ***(cit)***
Waring v. London and Manchester Assurance Co. [1935] 1 Ch 311 ***(cit)***

For the plaintiff - S. Achan; M/s. Tengku Mohamed, Achan & Lim
For the 1st & 3rd defendants - S. Suhendran; M/s. Saheran & Woon
For the 2nd defendant - Mohamad Illiayas bin Syed Ibrahim; M/s. Zain & Co.

JUDGMENT

Zakaria Yatim J:

In this application, the plaintiff is asking the Court to make an order in terms of the following prayers.

(a) That the defendants, their servants and/or agents be restrained from selling, disposing of or otherwise dealing in any manner whatsoever with assets from the 1st defendant or the 1st defendant itself as a going concern until after the trial of this action.

(b) That the defendant do pay the costs of the application.

The application was heard *inter partes*.

The facts as pleaded in the statement of claim are that by a credit facilities agreement dated 7 January 1982 entered into between the 1st defendant and eight financial institutions (the creditors), including the 2nd defendant, the creditors severally agreed to make available to the 1st defendant credit facilities up to the maximum aggregate principal amount of RM$20,000,000. The 2nd defendant acted as the agent and trustee for and on behalf of the creditors. As security for the said facilities, the 1st defendant executed a debenture in favour of the 2nd defendant as trustee for the creditors. By a guarantee dated 7 January 1982, the plaintiff and other guarantor jointly and severally guaranteed the repayment by the 1st defendant of the charges and all other sums payable by the 1st defendant to the 2nd defendant. The plaintiff is a major shareholder of the 1st defendant holding approximately 53% of the 1st defendant's paid-up and issued share capital. On 29 November 1988, the 2nd defendant by a deed of appointment, appointed the third defendant as receiver and manager under the debenture. The receiver and manager then proceeded to advertise for the sale of the 1st defendant as a going concern or in the alternative, for the sale of the 1st defendant's assets. On 1 December 1989, a sale and purchase agreement was entered into between the receiver and manager and Southern Iron & Steel Holdings Sdn. Bhd. in which the latter agreed to purchase the assets of the 1st defendant.

At the commencement of the hearing of the application, Mr. Suhendran, Counsel for the 1st and third defendant, raised two alternative preliminary points.

Firstly, he said, the plaintiff has brought the present action as derivative action. He contended that the derivative action was misconceived and bad in law.

Secondly, he pointed out that there was no allegation of fraud, collusion or mala fides made against the third defendant in the plaintiff's statement of claim. In the circumstances, he submitted that it was not open to the plaintiff to challenge the sale of the assets of the 1st defendant. It was noted that the third defendants power of sale conferred upon him by the terms of the debenture had not been challenged at all.

On these two preliminary points, he said the plaintiff was not entitled to the relief asked for in the present application.

Mr. Achan, Counsel for the plaintiff said that he was unable to find any authority to rebut the first point raised by Mr. Suhendran on the question of derivative action. According to him, the plaintiff commenced the suit in dual capacity *viz.* as shareholder of the 1st defendant, as receiver and manager owed a duty of care to the plaintiff as guarantor in disposing the assets of the 1st defendant. He cited the case, *Standard Chartered Bank Ltd. v. Walker* [1982] 3 All ER 938 to support his contention that the plaintiff as guarantor has a cause of action against the receiver and manager.

In *Standard Chartered Bank*, the situation was different. In that case the guarantors did not commence the action. It was the Standard Chartered Bank who issued a writ against the guarantors and applied for summary judgment under O. 14 of the English Rules of the Supreme Court.

The question that arises here is whether the plaintiff, as shareholder and guarantor can bring the present derivative action.

In *Watts & Anor v. Midland Bank* [1986] BCLC. 15, the Court held that the derivative action brought by the plaintiff was misconceived and had no justification.

The headnote of that case reads as follows:

> Ebrite Estates Ltd. (Ebrite) charged its principal asset, a leasehold interest in a substantial property, to the Midland Bank plc (the bank), the 1st defendant. The debts of Ebrite from the plaintiffs, the majority shareholders and directors of Ebrite. Ebrite did not trade profitably and the bank appointed the 2nd and third defendants as receivers of Ebrite's assets. In August 1984, Ebrite, acting through the receivers, entered into a contract for the sale of its leasehold interest. The plaintiffs, who had offered to purchase Ebrite's leasehold interest from the receivers, were critical of the August 1984 sale agreement and considered the receivers to have breached their duty to Ebrite in entering into it. They brought a derivative action as shareholders on behalf of Ebrite for a declaration that the August 1984 agreement was not binding on Ebrite and for an order setting it aside. The plaintiffs also appealed from the decision of the master refusing to make an order that Ebrite indemnify them against their costs.
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> Held - Although a company in receivership could not interfere with the receiver in the proper exercise of his powers, a company could maintain an action against a receiver for the improper discharge of his duties. Accordingly, as Ebrite could have commenced the present action against the receivers, there was no justification for allowing the derivative action as the plaintiffs as directors and majority shareholders of Ebrite could have procured the company to bring the action on its own behalf. Also, even if the derivative action had not been misconceived, this was not an appropriate case in which an indemnity order as to costs should be granted. An indemnity should only be allowed where the benefit of a company's shareholders, but as Ebrite was hopelessly insolvent there could be no such benefit in the present case and the only persons who could benefit from the action were the plaintiffs as the leasehold interest. In addition this was not a case in which Ebrite as plaintiff could obtain an interlocutory injunction to prevent a sale.

In view of the decision in *Watts* case I find that the derivative action brought by the plaintiffs in the present case is misconceived. It should be noted that the property does not belong to the guarantor. It belongs to the 1st defendant. It follows therefore that the plaintiff is not the proper party to seek the relief sought for in the present application.

If I am wrong in making the above finding, the next question to consider is whether the plaintiff is entitled to a restraining order on the basis of what was pleaded in the statement of claim. The authorities show that before a mortgagee can be restrained from selling mortgaged property he must be shown to have acted in bad faith or fraudulently. See *Forsyth v. Blundell* [1973] 120 CLR 477; *Kian Choon Investments (Pte) Ltd. v. Societe Generale & Anor*. [1990] 2 MLJ 74 at p. 84, *Hoddington Quarry Ltd. v. Huson* [1911] AC 722 at p. 727, 729 *Waring v. London And Manchester Assurance Co.* [1935] 1 Ch. 311 at p. 319

In the present case the plaintiff has not pleaded that the receiver and manager had acted in bad faith or fraudulently. If bad faith or fraud had been pleaded, then the Court can go into the merits of the application and determine whether there is a triable issue in this case.

For the reasons stated above I dismiss the application with costs.

Also found at [1992] 2 CLJ 1041